STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

RHODE ISLAND STATE LABOR RELATIONS BOARD

CASE NO: ULP-5548

-AND-

THE TOWN OF BARRINGTON

## DECISION AND ORDER OF DISMISSAL

## TRAVEL OF CASE

The above-entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board"), on an Unfair Labor Practice Complaint (hereinafter "Complaint"), issued by the Board against the Town of Barrington (hereinafter "Employer"), based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated July 10, 2001, and filed on July 16, 2001, by Local 351, International Brotherhood of Police Officers, (hereinafter "Union").

The Charge alleged:

> That the Employer violated 28-7-12 and 28-7-13 (6) of the Rhode Island Labor Relations Act when it instituted a sick leave policy without bargaining.

Following the filing of the Charge, an informal conference was held on August 29, 2001 between representatives of the Union and Respondent and an Agent of the Board. After the informal conference failed to resolve the Charge, the Board reviewed the matter at its September 20, 2001 meeting and determined that a Complaint would issue. The Board notified the parties of the same on September 25, 2001, and issued the instant Complaint on May 8, 2002. The Employer filed its Answer to the Complaint on May 14, 2002, denying the allegations contained in paragraphs 3 and 4 of the Complaint and asserting four affirmative defenses.

Formal hearings on this matter were held on May 30, 2002, and November 14, 2002.

[1] After the Employer filed its Answer in this case, the Rhode Island Supreme Court issued its decision in State of Rhode Island, Department of Environmental Management v Rhode Island State Labor Relations Board, 799 A.2d 274 (R.I. 2002) In that case, the Court held that the Board was deprived of jurisdiction to hear the unfair labor practice charge because of the election of remedies doctrine. The Employer's post hearing brief argues, in part, that the election of remedies doctrine is applicable in the within matter, because the doctrine of election of remedies goes to the Board's subject matter jurisdiction, and because both parties have briefed the issue, the Board will address the same without having required the Employer to file an amended Answer, asserting this additional affirmative defense.

Upon conclusion of the hearings, both the Employer and the Union submitted written

In arriving at the Decision and Order of Dismissal herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within the post hearing briefs.

## FACTUAL SUMMARY

In May, 2000, the Employer disciplined two employees (Thomas Poirier and Josh Birrell) for what the Employer believed was an abuse of sick leave. At that time, the Employer did not have any formal policy as to what constituted an abuse of sick leave. Both employees filed grievances over their discipline, which ultimately proceeded to arbitration, pursuant to the parties' collective bargaining agreement. In an award dated December 10, 2000, Arbitrator Charles T. Schmidt upheld one of the grievances, on the basis that the Town had not communicated its policy concerning sick leave abuses, prior to disciplining the employee.

As a result of the arbitration award and what the Town believed was a continuing need for monitoring of employee sick leave abuses, Town Manager Dennis Phelan issued a memorandum dated January 4, 2001 to all union presidents, including Local 351, IBPO. (Union Exhibit #1) In the memo, Mr. Phelan advised that he would be amending the Town employees' quarterly attendance reports to include an advisory/warning regarding the use and abuse of sick

The memo indicates that the amendment to the attendance reports will be effective for the attendance reports for the last quarter of 2000, which were due out shortly. At the end of the notice was the following statement: "If you have any questions or you wish to discuss this notice, please fee free to contact me."

In response to this memo, Sergeant Dino DeCrescenzo, the Union President, immediately sent a memorandum to Mr. Phelan acknowledging receipt of the memo and requesting an opportunity to bargain over the standards and conditions stated therein, prior to the implementation of the amendment.[2] Mr. Phelan then commenced a series of attempts to meet with the Union, as requested. He began by calling the dispatch center, trying to speak with Sgt. DeCrescenzo, and left the dates of January 11 and January 12, 2001 as possible dates for a meeting. Sgt. DeCrescenzo was not able to make it for either of those dates, but the parties did schedule a meeting for January 18, 2001. (TR. 5/30/02 p. 79) The meeting did not take place,

[2] DeCresenzo's request to bargain was dated January 4, 2001

however, because Sgt. DeCrescenzo called to cancel it. (TR. 5/30/02 p. 79) The next day, Mr. Phelan again called the dispatch center in an effort to reschedule the meeting. **The parties agreed to meet on January 29, 2001, at 3:30 pm. However, on January 26, 2001, Sgt. DeCrescenzo** again called to cancel the meeting and suggested that it take place on January 31, 2001, when the **Union's national representative, Ralph Ezovski, was already scheduled to meet with Mr. Phelan** concerning collective bargaining negotiations for the dispatcher's union. (TR. 5/30/02 p. 80)

Mr. Ezovski and Mr. Phelan did, in fact, finally meet on January 31, 2001 regarding the sick leave policy amendment to the attendance reports. (TR. 5/30/02 p. 81) At that time, Mr. Ezovski indicated that he didn't have a problem with the amendment, but that he would have to **talk with the local union representatives and then get back to Mr. Phelan. (TR. 5/30/02 p. 81) The next day, Mr. Phelan and Mr. Ezovski met on another matter, and Mr. Ezovski indicated that** the other local IBPO union he represented, Local 555, did not have a problem with the language **of the sick leave amendment. Mr. Ezovski had not yet spoken to the representatives of Local 351. (TR. 5/30/02 p. 82)**

**The next time the parties spoke about the matter was on February 8, 2001, at the conclusion of an arbitration hearing. Mr. Phelan inquired whether Mr. Ezovski had spoken to the local representative concerning the proposed amendment. Mr. Ezovski had not. (TR. 5/30/02 p. 82)** Two weeks later, on February 23, 2001, Mr. Ezovski showed up unexpectedly at Mr. Phelan's office, and stated that he was there for a meeting regarding the amendment. **Although Mr. Phelan indicated that he was unaware of the meeting being scheduled; he would, in fact, be happy to meet, in that his schedule could accommodate the meeting. (TR. 5/30/02 p. 83) Mr. Ezovski indicated that this would not be necessary, and that the Union would re-schedule. The parties did re-schedule for February 26, 2001, but Mr. Ezovski called to cancel it again. At that time, Mr. Ezovski also indicated that Sgt. DeCresenzo would be unavailable all week to meet. Mr. Ezovski also indicated that he would call Mr. Phelan on February 27th to reschedule the meeting. Mr. Ezovski failed to call on the 27th. On March 1, 2001, Mr. Phelan notified Sgt. DeCrescenzo that the 4th quarter attendance reports for 2000, with the attendance amendment, which Mr. Phelan had been holding since the January 4, 2001 request to bargain, would be issued with the paychecks on March 2, 2001. On March 2, 2001, Mr. Phelan did issue the 4th quarter attendance reports, as amended. (TR. 5/30/02 p. 84)**

On March 5, 2001, the Union filed a grievance on behalf of member Scott McGovney, claiming that the memorandum issued by Mr. Phelan was in violation of the parties' collective bargaining agreement. (Employer's Exhibit #7) In its grievance, the Union demanded that the memo issued by Mr. Phelan on March 2, 2001 be retracted and amended to conform to the collective bargaining agreement.

Subsequent to the grievance being filed, Mr. Phelan continued to attempt to meet with Union officials concerning the sick leave abuse amendment to the attendance reports. On March 21, 2001, Mr. Phelan spoke to Mr. Ezovski regarding the union's concerns over the sick leave abuse amendment to the attendance reports, and Mr. Ezovski again replied that he would have to speak to the local union representatives. (TR. 5/30/02 p. 87) In mid-April 2001, having heard nothing from Mr. Ezovski, Mr. Phelan tried to reach Mr. Ezovski by telephone and left a message for him to call. Finally, on April 18, 2001, Mr. Phelan was able to reach Mr. Ezovski, but Mr. Ezovski was not able to provide any substantive response to Mr. Phelan as to whether the parties could resolve their concerns over the sick leave amendment to the attendance reports. (TR. 5/30/02 p. 87) On April 19, 2001, Mr. Phelan again called Mr. Ezovski and offered a number of available dates for the parties to meet and discuss the issue. When Mr. Phelan did not hear back from Mr. Ezovski, he called him again on April 25, 2001 Mr. Ezovski, advised Mr. Phelan that he had been playing "phone tag" with Sgt. DeCrescenzo, but that Mr. Ezovski would call Mr. Phelan back. (TR. 5/30/02 p. 89) Mr. Ezovski did not call back.

On May 1, 2001, Mr. Phelan again called Mr. Ezovski, but could not reach him. On May 2, 2001, Mr. Phelan called again and was finally able to reach Mr. Ezovski and they scheduled a meeting for May 7, 2001 Although the parties finally met on May 7, 2001, and Mr. Ezovski finally provided some concrete feedback on the sick leave amendment to the attendance reports, the parties did not come to an agreement. Mr. Phelan indicated to Mr. Ezovski that time was running out for Mr. Phelan to issue the 1st quarter attendance reports for 2001, which were already long overdue. Mr. Phelan indicated that Mr. Ezovski needed to respond to him as soon as possible. (TR. 5/30/02 p. 91) Despite this notification, Mr. Phelan did not hear from Mr. Ezovski. On May 14, 2001, Mr. Phelan called Mr. Ezovski and was told that he was out of town until May 17, 2001. Mr. Phelan left a message for Mr. Ezovski to call upon his return. Mr. Ezovski did not call. On May 23, 2001, after having no additional response from the Union, Mr.

Phelan issued a memorandum to Sgt. DeCrescenzo indicating that the attendance reports for 1st quarter of 2001 would be issued with the May 25, 2001 paychecks; and the Town did, in fact, distribute the attendance reports. (TR. 5/30/02 p. 92)

On May 30, 2001, Mr. Phelan received a memorandum from Sgt. DeCrescenzo, which addressed the union's concerns with the sick leave amendment to the attendance reports. In response, Mr. Phelan called the police station on June 4, 2001 in an effort to speak to Sgt. DeCrescenzo; Sgt. DeCrescenzo was not available and did not return the call. (TR. 5/30/02 p. On June 6, 2001, Mr. Phelan called again. The parties agreed to meet on June 11, 2001, but no one from the Union showed up that day. (TR. 5/30/02 p. 94) The next day, the Union called to apologize for missing the meeting and asked to reschedule for June 19th. (TR. 5/30/02 p. 94) On June 19th, the union called and asked to reschedule again for June 29th. (TR. 5/30/02 p. 94) On June 29th, the parties finally met and discussed the issue, as well as the Union's grievance on the issue. (TR. 5/30/02 p. 94-95) They did not come to any agreement. On July 16, 2001, the Union filed the instant charge alleging that the Employer violated R.I.G.L. 28-7-13 (6) by instituting a sick leave policy without bargaining.

## POSITION OF THE PARTIES

The Employer argues that the Board lacks jurisdiction to hear this matter, pursuant to the election-of-remedies doctrine; that the Employer had no duty to bargain with the Union prior to implementing the "sick leave policy"; and that even if the Employer did have a duty to bargain, it did everything in its power to fulfill this obligation prior to implementing the policy.

The Union argues that the election-of-remedies doctrine does not apply to this case; that the employer, without prior bargaining, unilaterally implemented a change to a term or condition of employment that was a mandatory subject for bargaining.

## DISCUSSION

The first issue to be addressed is the subject of the Board's jurisdiction to hear this case. The Employer argues that the McGovney grievance is identical, in all respects, to the within Unfair Labor Practice charge, as evidence by a memorandum dated May 25, 2001 and the language of a settlement agreement (Employer's Exhibit #1). Specifically, the Employer points to the following language in the settlement agreement: "Whereas, a dispute has arisen between the" Union and the Town "with regard to the implementation of an attendance policy...

Town argues that the Union has sought the same remedy from both the arbitration process and the Board, via the Unfair Labor Practice charge. Thus, the Town argues that the present matter is not appropriately before the Board and should be dismissed.

The Union's brief discusses the Poirier and Birrell grievances and argues that they do not bar the within matter because they arose before the facts that give rise to the within complaint. The Board agrees. However, the Employer is not claiming that the Poirier and Birrell grievances rise to the election-of-remedies doctrine. The Employer claims it is the McGovney grievance that now bars the Board's jurisdiction. Although the Union's brief does not discuss this issue; and, therefore, its opinion is not known, the Board must nevertheless make a ruling on whether it has subject matter jurisdiction in this matter.

Toward that end, the Board has reviewed Employer's Exhibit #7 which consists of the followings documents: (1) The McGovney grievance, #001-01, dated March 5, 2001; (2) Chief Lazzarro's denial of the McGovney grievance dated March 6, 2001; (3) Memo from McGoveny to Town Manager Phelan dated March 7, 2001; (4) Memo from McGovney to Phelan dated July 7, 2001; and (5) the demand for arbitration, filed with the American Arbitration Association. The Board has also reviewed Employer's Exhibit #1, the settlement agreement for arbitration No. AAA 11-390-02041-

The Board notes that Exhibit #7 (5), the AAA demand for arbitration, does not contain a AAA case number anywhere thereon. In addition, the nature of the dispute is stated as: "That the Town of Barrington disciplined grievant without just cause for use of sick time, in violation of Article VI, Section and 2, and also Article XI, Section 2 and Article XIV, Section 1." The relief sought is stated as: "That the Grievant be made whole, including but not limited to all disciplinary actions be rescinded." The settlement agreement submitted as Employer's #1 does reference a case number, but does not reference either discipline or the McGovney grievance. settlement agreement does indicate that a dispute has arisen, but it does not reference the remedy sought or even the identity of the grievant. Therefore, it is unclear to the Board whether or not these two documents relate to each other, or what the nature of the "dispute" was, which was settled by Employer's Exhibit #1. Although there is a likelihood that these documents do refer to the same matter and that the election-of-remedies doctrine may be able to be invoked, the

record is insufficiently clear on that issue. Therefore, the Board will not decline to decide the matter before it.

That having been said, the Board shall next take up the issue of whether or not there was any duty on the part of the Employer to bargain over the implementation of the sick leave abuse policy. The Employer argues that it had no duty to bargain due to a "broad management rights clause" contained in the parties' collective bargaining agreement. The Union argues that the policy touched on a mandatory subject for bargaining because it incorporated the subject of discipline, up to and including termination. Therefore, the Union argues that the Employer was obligated to bargain, in good faith, with the Union prior to its implementation; that it did not do so; and, therefore, is guilty of committing an Unfair Labor Practice. It is well-settled that disciplinary rules are mandatory subjects for bargaining. Newspaper Guild Local 10 v. NLRB. 636 F.2d 550 (D.C. Cir. 1980) In this case, the sick leave policy which was proposed by the Employer stated in pertinent part: "Excessive absences and/or abuse of sick leave will be met with discipline up to and including termination of employment." Therefore, since the policy incorporated the possibility of discipline, it implicated a mandatory subject for bargaining and triggered a duty to bargain on the Employer's part.

The final issue, then, is whether or not the Employer failed to bargain, in good faith, prior to implementation of the policy. The Union argues that "There is little dispute if any that when Town Manager Dennis Phelan announced the Town's sick leave policy by written notice . he was attempting to unilaterally alter the working conditions of [union] members of the Barrington Police Department." (Union brief p. 8) The Union argues that its immediate response to the manager's January 4, 2001 memo "triggered the Town's obligation to bargain with the Union as required by Section 13 (6) of the Labor Relations Act, prior to the implementation of the policy. The Union notes in its brief that its January 4, 2001 memo even informed the Town that it wished to bargain "prior to their implementation". The Union argues that in order for the Town to fulfill its bargaining obligation, under the Act, the Town had to first rescind the January 4, 2001 notice, then the Town should have met and bargained a sick leave policy with the Union, in good faith. The Union argues that the Town did not rescind its policy, but instead implemented the policy, and at the same time agreed to meet with the Union to "negotiate". The

Union argues that the Town's conduct constitutes a "per se" violation of its bargaining obligation.

The Union argues that an Employer does not bargain, in good faith, when it first implements its unilateral changes, and then agrees to negotiate after the changes are already in effect. (Union's Brief p. 9) The Board could not agree more with this statement. However, that is *not* what happened in this case. What happened here is that the Employer put the Union on *notice* of an *intended change*. (Union Exhibit #1) The memo to the Union ended with the following statement: "If you have any questions or you wish to discuss this notice, please feel free to contact me. While the language of this memo might suggest that the policy was implemented, it is undisputed that the Town Manager did not implement the policy for the members of this local as of January 4, 2001 When Mr. Phelan received the Union's demand to bargain, prior to implementation, he did not implement the policy and issue the new statements, as he had intended to. Instead, he embarked on a lengthy and extended effort to get the Union, in this case, to sit down and identify its concerns, and discuss the same The Board does not believe that the Employer had to rescind the memo, because it merely indicated that the Employer wished to implement a new policy

The undisputed facts, in this case, establish that, other than the January 4, 2001 "demand to bargain" initiated by the Union, the Town Manager initiated all subsequent efforts to discuss this matter between January 4, 2001 and March 2, 2001, when the Manager finally issued the 4th quarter 2000 attendance reports with the new sick leave policy. The Manager repeatedly called, scheduled and rescheduled meetings. The Union repeatedly scheduled and then cancelled meetings to discuss the issue. The Union's representatives repeatedly promised that they would get back to the Manager and failed to do so.

When issued on March 2, 2001, the attendance reports contained the following "sick leave policy"

> "Good attendance is a job requirement for all Town employees. Employees are expected to be at work each scheduled workday. While Town employees are allowed to accumulate sick leave, sick leave may only be taken for personal illness, or a family illness as set forth in an applicable collective bargaining agreement.
>
> The use of six (6) or more sick days in any calendar year by a Town employee will cause the Town to examine whether the employee has excessive absences, or whether the employee is abusing sick leave. Examples of sick leave abuse may include, but are not limited to, an employee taking sick days on days when the employee or a family member is not ill or taking sick leave to extend other types of

time off granted by Town policy or pursuant to an applicable collective bargaining agreement. Excessive absences and/or abuse of sick leave will be met with discipline up to and including termination of employment."

Also, on March , 2001, the Manager issued a confidential memorandum to Sgt. DeCrescenzo indicating that he had concerns over particular members of the Union (Bruce Dufresne, Shane Allen and Josh Birrell), and their use of sick leave. There was no disciplinary action taken against any of these employees at this time, thus no implementation of the policy. The record establishes that, after he issued the first quarter reports, the Town Manager continued in his efforts to meet with the Union to discuss whatever concerns it had concerning the policy. The unrebutted testimony indicates that the Manager called the Union on seven (7) different occasions between March 21, 2001 and May 25, 2001 and was successful on meeting with the Union on only one occasion. Nevertheless, when the Manager pushed for a substantive response from the Union, and indicated that time was running out for him to issue the 1st quarter attendance reports, the Union failed to respond.

On May 23, 2001, when the first quarter attendance reports were issued, the Manager again issued a confidential memorandum indicating that he continued to be concerned about the level of sick time being used by Allen and Dufresne, and that he expected to initiate disciplinary action against these two employees in the near future. The same warning was including in an August 14, 2001 confidential memorandum, which preceded the release of the 2nd quarter attendance reports. Union Exhibits #7 and #8 (grievances filed by Allen and Dufresne) indicate that the Employer did not actually take action under the sick leave abuse policy until November 2001, when it initiated disciplinary proceedings against Officer Allen. The Employer finally took action with respect to Officer Dufresne in February, 2002.

The Union argues, on the one hand, that the Employer implemented the policy upon issuance, but on the other hand acknowledges in its demand to bargain of January 4, 2001 that it wished to bargain with the Employer *prior to implementation*. The Board believes, therefore, that the implementation of the policy did not take place until November 2001, almost a year after the Union had been notified that the Employer wanted to implement such a policy. The facts in this case establish that the Employer did agree to meet and bargain with the Union and held off implementing the issuance of the attendance reports for months at a time, while it attempted to bargain in good faith the Union.

The duty to bargain in good faith extends not only to the Employer, but the Union as well. In this case, the evidence has established that the Employer tried valiantly to meet with Union representative and to obtain a clear response from them on their concerns The facts also show that the Union repeatedly cancelled meetings and failed to return phone calls on this issue. Whether the Union was deliberately using dilatory tactics or was just negligent in its duties is not clear from the record presented, but it is clear that any lack of bargaining in this case is not the fault of the Employer.

## FINDINGS OF FACT

) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.

2) The Union is a labor organization, which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection; and, as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.

3) In May, 2000, the Employer disciplined two employees (Thomas Poirier and Josh Birrell) for what the Employer believed was an abuse of sick leave.

4) In an award dated December 10, 2000, Arbitrator Charles T. Schmidt upheld one of the grievances on the basis that the Town had not communicated its policy concerning sick leave abuses, prior to disciplining the employee.

5) On January 4, 2001, the Town Manager sent a memo to all Town employee union presidents, including Local 351, IBPO. advising that he will be amending the Town employees' quarterly attendance reports to include an advisory regarding the use and abuse of sick time. The memo indicates that the amendment to the attendance reports will be effective for the attendance reports for the last quarter of 2000, which were due out shortly. At the end of the notice was the following statement: "If you have any questions or you wish to discuss this notice, please feel free to contact me."

6) In response to this memo, Sergeant Dino DeCrescenzo, the Union President, immediately sent a memorandum to Mr. Phelan acknowledging receipt of the memo and requesting an opportunity to bargain over the standards and conditions stated therein prior to the implementation of the amendment.

7) Mr. Phelan then commenced a series of attempts to meet with the Union, as requested. Although the parties did meet on one occasion, all other attempts made by the Town Manager to meet or discuss were thwarted by the Union -- either by failing to return phone calls or canceling meetings.

8) On March ., 2001, Mr. Phelan notified Sgt. DeCrescenzo that the 4th quarter attendance reports for 2000, with the attendance amendment, which Mr. Phelan had been holding since the January 4, 2001 request to bargain, would be issued with the paychecks on March 2. 2001. On March 2, 2001, Mr. Phelan did issue the 4th quarter attendance reports, as amended.

9) On March 5, 2001, the Union filed a grievance on behalf of member Scott McGovney claiming that the memorandum issued by Mr. Phelan was in violation of the parties' collective bargaining agreement. In its grievance, the Union demanded that the memo issued by Mr. Phelan on March 2, 2001 be retracted and amended to conform to the collective bargaining agreement.

10) Subsequent to the grievance being filed, Mr. Phelan continued to attempt to meet with Union officials concerning the sick leave abuse amendment to the attendance reports. Between March 21, 2001, and May 25, 2001, Mr. Phelan initiated nine attempts to discuss the issue, with only one of those attempts culminating in a meeting.

11) On May 23, 2001, after having no additional response from the Union, Mr. Phelan issued a memorandum to Sgt. DeCrescenzo indicating that the attendance reports for 1st quarter 2001 would be issued with the May 25, 2001 paychecks; and the Town did, in fact, distribute the attendance reports.

12) After the Town Manager issued the second quarterly reports and confidential memoranda to the Union President about the sick leave totals of some employees, he continued to make repeated efforts to discuss the matter with Union officials, to no avail.

13) On July 16, 2001, the Union filed the instant charge alleging that the Employer violated R.I.G.L. 28-7-13 (6) by instituting a sick leave policy without bargaining.

14) The Employer finally implemented the policy in November 2001, when it took discipline against one member of the Union for excessive use of sick time.

## CONCLUSIONS OF LAW

1) The Board has subject matter jurisdiction to hear the within case.

2) The Employer's policy touched on a mandatory subject for bargaining, thus triggering a duty to bargain.

3) The Union has not proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of 28-7-12 or 28-7-13 (6).

## ORDER

1) The Unfair Labor Practice Charge and Complaint in this matter are hereby dismissed.

**RHODE ISLAND STATE LABOR RELATIONS BOARD**

Walter J. Lanni, Chairman

Frank J. Montanaro, Member (DISSENT)

Joseph V. Mulvey, Member (DISSENT)

Gerald S. Goldstein, Member

Ellen L. Jordan, Member

John R. Capobianco, Member (DISSENT)

Elizabeth S. Dolan, Member

**Entered as an Order of the**
**Rhode Island State Labor Relations Board**

Dated: March 17, 2003

By: Joan N. Brousseau, Administrator